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No. 47867-6-II

Lewis County #14-1-00443-0

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERT KINNEY,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
LEWIS COUNTY

The Honorable Richard Brosey, Nelson Hunt and Stephen Lawler, Judges

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APPELLANT'S OPENING BRIEF

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

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1. Appellant Robert Kinney was deprived of his rights to self-representation under the Sixth and Fourteenth Amendments and Article I, § 22, and the resulting plea entered under North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed. 2d 162 (1970), was not knowing, voluntary and intelligent.

2. Reversal is required to allow Mr. Kinney to withdraw his Alford plea in order to correct a manifest injustice.

3. The sentencing court erred in failing to properly consider Mr. Kinney's actual ability to pay as required under RCW 10.10.160(3), State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), and State v. Leonard, 184 Wn.2d 505, 358 P.3d 1167 (2015), before imposing discretionary legal financial obligations and costs of incarceration. See CP 131-33.

4. Appointed counsel was prejudicially ineffective at sentencing.

5. Appellant assigns error to the following "boilerplate" pre-printed findings on the judgment and sentence:

> **2.5 Legal Financial Obligations/Restitution.** The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:
>
> . . .
>
> [x] The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

CP 131.

6. RAP 18.1(b) does not apply and this Court should summarily reject Division One's erroneous reasoning creating a new, inefficient pleading requirement under the theories of that rule in State v. Sinclair, __ Wn. App. __, __ P.3d __ (2016 WL 393719).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is an inherently equivocal Alford plea to a lesser offense constitutionally invalid where the defendant was denied his constitutional rights to self-representation and entered the plea as a result of that denial?

2. Blazina was decided months before the sentencing decision in this case. Did the trial court err in failing to follow the mandates of Blazina and in failing to properly consider Mr. Kinney's actual present and future ability to pay before imposing discretionary legal financial obligations?

   Did the trial court further fail to consider ability to pay properly before imposing an order of costs of incarceration under RCW 9.94A.760(2) under the controlling precedent of Leonard, supra?

3. Was counsel prejudicially ineffective in failing to argue that the court should properly consider ability Mr. Kinney's ability to pay under Blazina and under RCW 9.94A.760(2) and RCW 10.01.160(3)?

4. Should this Court decline to follow the improper reasoning of Sinclair, because Division One's adoption of new pleading requirements under that rule runs afoul of the Rules of Appellate Procedure, the statute authorizing costs on appeal and decisions of our highest Court?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Robert Kinney was charged by information in Lewis County Superior Court in July of 2014 with first-degree rape of a child, alleged to have taken place between 2007 and 2009. CP 1-2; RCW 9A.44.073.

A finding of competency was entered by the Honorable Judge James Lawler on September 25, 2014. CP 39; 9/25RP 9-10.[1] Shortly

[1]For this reason, they will be referred to herein with the date and then RP and page number, for example, March 15, 2015, as 3/15RP 17. The entire transcript, in chronological order, consists of volumes containing the proceedings of July 30 and 31,

thereafter, the prosecution amended the information to add aggravating factors that the offense involved an invasion of the victim's privacy (RCW 9.94A.535(3)(p)), that the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance (RCW 9.94A.535(3)(b)) and that the defendant used his position of trust, confidence or fiduciary responsibility to facilitate the commission of the current offense (RCW 9.94A.535(3)(n)). CP 40-41

Motions/continuances were held before the Honorable Judges Nelson Hunt, Richard Brosey and Stephen Lawler on July 30-31, September 25, October 9, 16 and 30, November 3 and 6, 2014, January 8 and 29, February 5, March 12 and 18, 2015. On March 19, the Honorable Judge Richard L. Brosey accepted Mr. Kinney's plea to a second amended information which dismissed the rape charge and aggravating factors and instead alleged only first-degree child molestation. CP 64; RCW 9A.44.083.

After new counsel was appointed, Judge Brosey denied a motion to withdraw the plea and imposed a standard-range sentence. CP 92-93, CP 120-22, 127-41. Mr. Kinney appealed and this pleading follows. See CP 144.

2. Overview of facts relevant to issues on appeal

Because Mr. Kinney is indigent, counsel Donald Blair was appointed to represent him. CP 17. Early in the proceedings, it was clear that Mr. Kinney was maintaining his innocence and wanted to take a

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September 25, October 9, 16 and 30, November 3 and 6, 2014, January 8 and 29, February 5, March 12, March 16, 18 and 19, July 24 and July 14, 2015.

polygraph examination or "lie detector" test to prove that point. See 10/16RP 3 (Kinney being arraigned on the amended information, asking "[h]ow come I can't have that lie detector to prove I didn't do it?").

On November 6, 2014, Mr. Kinney was asked to waive his rights to speedy trial all the way through March 30, 2015. CP 48. The prosecution requested this lengthy continuance because the detective had told the prosecutor a "close family friend is expected to pass away this week" and the officer was a caregiver for that person. CP 49-50. At the hearing on the motion to continue, counsel called the continuance "agreed" and said he had discussed it with Mr. Kinney. 11/3RP 4. When the court turned to Kinney, however, he did not know why he was being asked to waive his speedy trial rights. 11/3RP 4. The court then explained, "there's a state's witness who cannot be present at your trial because he's taking care of his father in Hospice care." 11/3RP 4.

On January 5, 2015, the prosecution filed another motion to continue, this time because the same witness, Detective Lee, was "unavailable for trial" due to a "pre-approved vacation" out-of-state on the week of January 26, 2015. CP 53-54. At the hearing on that motion, counsel said he had no valid objection to the continuance based on how far out speedy trial was set. 1/8RP 6.

A couple of weeks later, Mr. Kinney asked to represent himself. CP 56. At a hearing before Judge Hunt on January 29th, counsel told the court he had been meeting with Kinney "regularly" but Mr. Kinney had continued to be unhappy and wanted to fire his attorney and represent himself. 1/29RP 8. Counsel suggested that he could serve as "standby" if

needed. 1/29RP 8.

After talking to Mr. Kinney about whether he had any experience in law or representing himself, the judge refused to appoint standby counsel. 1/29RP 10-11. When the judge also refused to dismiss counsel, Mr. Kinney tried to do so himself, but Judge Hunt said Kinney was "not qualified to represent" himself so he was going forward with counsel regardless of his wishes. 1/29RP 10-11. Several days after this hearing, Blair told Judge Hunt that Kinney had decided to keep Blair as counsel, and Kinney affirmed. 2/5RP 13.

On March 12, however, Kinney's continued unhappiness with appointed counsel Blair had not yet been redressed. 3/12RP 14-15. He told the court, "I want to represent myself." 3/12RP 15. After a lengthy discussion, Judge Hunt relieved Blair from representing Kinney and said, "[t]his case will proceed to trial with Mr. Kinney representing himself." 3/12RP 21. Counsel told the court he had a trial binder prepared and would drop it off for Kinney at the jail. 3/12RP 21. Counsel also said he would prepare an order allowing himself to withdraw. 3/12RP 21.

Just a few days later, however, Judge Lawler called the parties back in for a hearing to talk about Kinney's decision to represent himself. 3/16RP 13. Although Judge Hunt had granted Mr. Kinney's motion for self-representation, Judge Lawler told Mr. Kinney that Kinney would not be allowed to represent himself unless Judge Lawler decided it was okay after Judge Lawler had a chance to talk to Kinney about it. 3/16RP 13-14.

The judge then engaged in a lengthy discussion about the risks Kinney faced at trial and the dangers of self-representation. 3/16RRP 14-

15. The judge also opined that Blair was a good attorney, noting that Blair had been a deputy prosecutor. 3/16RP 15. Unlike Judge Hunt, Judge Lawler told Mr. Kinney about the possibility of standby counsel. 3/16RP 18. Blair again offered to serve. 3/16RP 26-27. Despite Kinney's exercise of his right to represent himself the previous week, Judge Lawler was still concerned that Mr. Kinney was "not understanding exactly the ramifications" of his decision. 3/16RP 26-27.

The judge was also concerned that the presentation of evidence would be lost in the fact that Kinney was representing himself, which would "be problematic because, quite frankly, as Judge Hunt told you last week, you don't know what you are doing." 3/16RP 28.

Mr. Kinney had started weeping by the time the judge ultimately asked Mr. Kinney if he was "seriously of a mind that you still want to represent yourself, knowing all of the things that I told you and Judge Hunt told you?" 3/16RP 28-29. The judge told Mr. Kinney that, with counsel reappointed, the judge would give Kinney an opportunity to raise concerns about what was being asked of witnesses if needed. 3/16RP 30.

Mr. Kinney apologized, "62 years old, crying like a baby." 3/16RP 30. At that point, the judge asked for some tissue and told Mr. Kinney to take his time, telling him that the judge did not want to make Kinney feel he was "being pressured." 3/16RP 30.

Mr. Kinney then engaged in an agonized declaration about how many other people needed to know the truth and how it was affecting him that people thought he was guilty. 3/16RP 30. When the judge asked why Kinney thought having an attorney would prevent that truth from coming

out, Kinney again raised his lack of confidence in counsel and that the right questions would not be asked which would get out the truth. 3/16RP 30. The judge then established with Kinney that if Mr. Kinney asked "who put you up to this" and the alleged victim said, "nobody," Kinney would be stuck with that answer. 3/16RP 31.

Mr. Kinney announced his intent to "go for it," which apparently meant have Blair reappointed as counsel. 3/16RP 31. Kinney admitted he was "very confused." 3/16RP 32. When the prosecutor asked for clarification, Judge Lambert announced that, because Kinney was now saying he was "very confused," that mean that Mr. Kinney had not made "a clear and unequivocal waiver of counsel." 3/16RP 33.

The judge told Mr. Kinney that Blair was counsel and he would be talking with Mr. Kinney about that, but that the court would set another hearing before the trial date, that Thursday, if needed, on the issue. 3/16RP 32-33. The prosecutor asked the court, "[c]an we confirm with Mr. Kinney that he is not likely to change his mind?" 3/16RP 33. Judge Lawler refused, however, saying, "what my focus on is that Mr. Kinney is confused, he's facing a serious matter in this trial, and as far as I'm concerned right now Mr. Blair is his attorney. And if, in fact, Mr. Kinney continues to be confused about that issue, we'll deal with it in the future between now and Thursday." 3/16RP 34. The prosecutor wanted to ensure that Mr. Kinney was aware that he was "giving up his right to represent himself," and the court said, "[a]t this juncture," that was happening. 3/16RP 34. The judge also said, however, "[i]f that changes between now and Thursday, we'll deal with it." 3/16RP 35.

When Mr. Kinney renewed his request to represent himself just before trial, however, Judge Lawler was not so flexible. CP 61; 3/18RP 39. On March 18, 2015, counsel told the court that, since the hearing earlier that week, he had met with Kinney "a couple of times," they had talked about the case, counsel had explained "in no uncertain terms" that regardless which judge was presiding Kinney would not be allowed to question witnesses himself if he had an attorney and that Kinney could only question witnesses if he represented himself. 3/18RP 39. Counsel said that, against his advice, Kinney was insistent on self-representation. 3/18RP 39-40.

Counsel said he had copied discovery and left it for Mr. Kinney at the jail. 3/18RP 41. There were several witness statements, however, which Mr. Kinney had not previously seen, so he would need some additional time. 3/18RP 41-42. The judge said that was a "real problem" because trial was set for the next day. 3/18 41-42. The judge also reminded Kinney that he had been unhappy about the November extension and speedy trial. 3/18RP 41.

Although the prosecution had received continuances and Kinney was willing to waive his speedy trial rights, Judge Lawler said, "basically I don't see a basis for a continuance here." 3/18RP 42-43. The judge asked the prosecutor if she objected to a continuance, and the prosecutor responded, "Mr. Kinney seems pretty insistent that he wants to represent himself." 3/18RP 43-44. The prosecutor said the victim's family objected to delay, however. 3/18RP 44.

Again, the judge explained how Mr. Kinney's complete lack of

experience with conducting a trial would work against him. 3/18RP 47. The judge promised to allow Mr. Kinney to confer with Mr. Blair without the jury there if needed to see whether any issues between them about what questions to ask could be resolved, if Kinney went forward with counsel. 3/18RP 47-48. The court told Kinney he needed to "think really long and hard" about what he was doing because of the seriousness of the case. 3/18RP 47-48. Mr. Kinney told the court he did not think counsel could represent him because Kinney's attorney did not believe in his innocence. 3/18RP 48. Eventually, however, Mr. Kinney said he "might as well just go for tomorrow," trial, with Blair as counsel. 3/18RP 48-49.

The next day, on March 19, 2015, Judge Brosey took Mr. Kinney's Alford plea to a second amended information charging only child molestation in the first degree. 3/19RP 77. Counsel told the court he had met with Kinney over several months and they had reviewed the evidence and "reports" involved. 3/19RP 76-77. Kinney steadfastly denied that he was guilty but that was aware that the victim would testify in a way which would likely result in Kinney being found guilty, specifically, that she would testify that "he touched her multiple times, including her vagina." 3/19RP 77. Counsel said that Kinney knew if he went to trial "he would be found guilty of a minimum the child molestation and possibly the child rape and then there are aggravators with that." 3/19RP 77.

In discussing why Kinney was entering the plea, counsel told the court that Mr. Kinney had "decided to enter this Alford plea to the child molestation in the first degree instead versus the more serious crime of rape in the first degree." 3/19RP 78. Counsel conceded that the issue was

that there were only "unfortunate options" for Kinney, who said he was innocent. 3/19RP 77-78.

The court then heard from Kinney, who said he would enter the plea only "[a]s long as you don't use the word guilty because I ain't." 3/19RP 78. Judge Brosey explained that the Alford plea did not involve an admission of guilt for the conduct but rather a balancing of best interests by the defendant. 3/19RP 78. The judge also told Mr. Kinney the plea meant "I don't agree with the evidence, but still I think it's highly likely that a judge or jury if their hear it and believe it is going to find me guilty[.]" 3/19RP 80.

More specifically, the judge said, in making the plea Mr. Kinney was saying he had gone over all the evidence and believe:

> it's highly likely that if a judge or a jury heard that evidence as a finder of act that that judge or jury would find beyond a reasonable doubt that you're guilty of the more serious charge of rape of a child first degree.

3/19RP 79. Judge Brosey also asked Kinney to confirm:

> I'm pleading guilty under the Alford Doctrine even though I say I didn't do this crime to take advantage of this plea offer because it gets rid of the risk that I'm going to get convicted of the much more serious charge and face the possibility of being locked away for the rest of my life.

3/19RP 79-80. When asked if anyone had threatened or promised him anything to persuade him to enter the plea, Mr. Kinney said, "[n]o, just no life in prison." 3/19RP 80.

The judge accepted the plea, noting that Mr. Kinney was 62, had only finished the 11th grade and had some trouble with "certain words" the lawyers used which were "[b]ig." 3/19RP 81-82. When the judge asked if

Kinney was "under a doctor's care or on any medication that would interfere with or affect" his ability to enter a plea, Mr. Kinney responded, "I'm under a doctor's care but they haven't - - they ain't let me have my medicine, so. . . ." 3/19RP 83. But when the court said, "Okay. But that wouldn't interfere with your ability to do the plea," Mr. Kinney responded, "[n]o." 3/19RP 83.

At that point, the court told Mr. Kinney it was going to have the prosecutor describe on the record the evidence the state would have presented to the jury if the trial had gone forward. 3/19RP 84. The judge instructed Kinney to "listen carefully[.]" 3/19RP 83-84. Judge Brosey told Kinney that he was going to ask Kinney two questions; if he agreed 1) that was the evidence the state would present and 2) a jury hearing that evidence would likely "find beyond a reasonable doubt that you are guilty of child rape in the first degree." 3/19RP 84.

The prosecutor then detailed the state's evidence against Kinney, which involved allegations from C.K. that, a number of years before, when she was about 8 or 9 years old, her uncle Mr. Kinney put his hand in her pants and touched her private parts, moved her underpants aside and put his mouth on her vagina. 3/19RP 84-85. The prosecutor also said there was evidence that Mr. Kinney had written a statement saying he put his hand down her pants for a moment and was sorry he did it; that it was "more than wrong[.]" 3/19RP 84-85.

The court then asked about whether there was proof of "actual penetration" to support a conviction for first-degree child rape and the prosecutor responded, "[n]o," and "no penetration even by tongue."

3/19RP 85.

The written declaration in the Statement of Defendant on Plea of Guilty provided:

> ALFORD PLEA- I DID NOT COMMIT THIS CRIME- BUT IN REVIEWING THE STATEMENTS I BELIEVE I WOULD BE FOUND GUILTY IF I PROCEED TO TRIAL AND WANT TO TAKE ADVANTAGE OR THE STATE'S OFFER.

CP 74 (emphasis in original).

On May 18, Mr. Kinney asked to file a motion to withdraw the plea and, referring to counsel, said, "I want to fire this butthead for the last and final time." 5/18RP 4. The court ultimately appointed new counsel. 5/18RP 6; CP 93. Before the next hearing, Mr. Kinney filed a one-page written motion to withdraw the plea. CP 101. On June 24, the parties appeared and the court then heard Mr. Kinney's sworn testimony, in which he said he did not plead guilty, thought he was having a jury trial and had ended up signing something Blair gave him which was blank and said nothing about child molestation. 5/18RP 9-11. He did not recall parts of the agreement, even those he initialed, saying that counsel was talking really fast and everyone was in out and the judge was wanting to know "is he ready yet." 5/18RP 17.

Mr. Kinney explained that he had chronic pain and trouble thinking so that he usually only realized what had happened to him in court after the fact. 5/18RP 26. Kinney was concerned that he had an absolute defense to first-degree child rape because the prosecutor had conceded there was no evidence of penetration. 5/18RP 32, 35.

Judge Brosey first noted that Kinney was wrong that penetration

meant no crime. 5/18RP 40. The judge also pointed out that Kinney had gotten a benefit from the plea because he faced a lower standard range. 5/18RP 40. The judge concluded that Mr. Kinney was just "in denial" and having "buyer's remorse." 5/18RP 40-41. When a frustrated Mr. Kinney said, "[b]ullshit," the judge told Mr. Kinney he would be in contempt and do "dead time" if he said another word and Kinney then said, "[g]ood" and insulted the court. 5/18RP 40. The court found Kinney in contempt and ordered 60 additional days in custody, after which Mr. Kinney used expletives and the judge increased the time to 120 days. 5/18RP 41.

At sentencing on July 14, 2015, Mr. Kinney again maintained his innocence. 7/14RP 46-47. Judge Brosey stated his belief that Kinney would always remain in denial about his guilt. 7/14RP 52. And the judge returned to the idea that Mr. Kinney would have been found guilty of the original charge, first-degree rape of a child, if he had gone to trial. 7/14RP 53.

D. ARGUMENT

1. APPELLANT'S ALFORD PLEA WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT AND HE SHOULD BE ALLOWED TO WITHDRAW IT TO CORRECT A MANIFEST INJUSTICE

Due process under both the state and federal constitution mandate that any plea in a criminal case must be knowing, voluntary and intelligent. See Boykin v. Alabama, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969); Wood v. Morris, 87 Wn.2d 501, 505, 554 P.2d 1032 (1976). Where a plea does not meet those standards, it would be a "manifest injustice" to allow that plea to stand. See State v. Taylor, 83 Wn.2d 594,

597, 521 P.2d 699 (1974).

In this case, this Court should reverse and remand with instructions to allow Mr. Kinney to withdraw his Alford plea, because it was not knowing, voluntary and intelligent and was the result of improper deprivation of the state and federal constitutional rights to self-representation. Further, the plea did not meet the higher standards required for an Alford plea to be valid..

At the outset, the issue is properly before this Court. Mr. Kinney moved to withdraw his plea well before sentencing. Further, the validity of a plea is an issue of constitutional magnitude which is a manifest error affecting a constitutional right. See State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2000); RAP 2.5(a)(3).

A defendant who enters a plea gives up important constitutional rights such as the right to trial by jury and to confront and cross-examine witnesses. Walsh, 143 Wn.2d at 8. Therefore, to satisfy due process, any plea of guilty must be knowing, voluntary and intelligent. See Boykin, 395 U.S. at 242. In general, CrR 4.2(d) mirrors those standards, mandating that a court is not permitted to accept a plea of guilty "without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d).

Once a plea is entered, CrR 4.2(f) governs its withdrawal. See State v. Saas, 118 Wn.2d 37, 43, 820 P.2d 505 (1991). Under that rule, a trial court "shall" allow a defendant to withdraw a guilty plea "whenever it appears that the withdrawal it necessary to correct a manifest injustice."

CrR 4.2(f). Washington courts have recognized several different examples of a "manifest injustice," although they are "nonexclusive;" 1) the plea was not ratified or authorized by the defendant, 2) counsel was ineffective, 3) the plea was involuntary, 4) the prosecutor breached the plea agreement. Saas, 118 Wn.2d at 42-43.

In this case, the trial court erred in accepting the Alford plea, because it was not knowingly, voluntarily and intelligently made and further did not meet the enhanced requirements a court must apply before accepting an Alford plea. The trial court then erred in refusing to allow Mr. Kinney to withdraw his plea to correct the manifest injustice, because Mr. Kinney was deprived of his constitutional rights to self-representation and his decision to enter the plea was the direct result of those deprivations.

Both the state and federal constitutions guarantee the defendant in a criminal case the competing rights of being represented by counsel and the right to self-representation. See Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Woods, 143 Wn.2d 561, 585, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001); Sixth Amend.; 14th Amend.; Art. 1, § 22. There is an inherent tension between the two rights, and a serious concern about the fairness of a proceeding at which the defendant, an untrained person with an emotional investment in the trial, represents herself. See State v. DeWeese, 117 Wn.2d 369, 375, 816 P.2d 1 (1991).

But the right to represent oneself does not depend upon what is "best" for a person exercising that right. See State v. Breedlove, 79 Wn.

App. 101, 106, 110, 900 P.2d 586 (1995). Self-representation is a right to "individual autonomy" which is honored even though the defendant is more likely to lose his case if he exercises the right. Id. Put simply, a person has the right,"in our society, devoted to the ideal of individual worth, to make the decision to represent herself - the right to use his own "free will to make his own choice, in his hour of trial, to handle his own case." Breedlove, 79 Wn. App. at 110-11 (quotations omitted).

Indeed, the right to self-representation is so fundamental that depriving a person of it is not just constitutional error - it is *structural* constitutional error, requiring automatic reversal. See McCaskle v. Wiggins, 465 U.S. 168, 177 n. 8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984). Again, even though "most defendants are probably better represented by counsel than themselves," the "harmless error" standard cannot be applied to the denial of the right to self-representation, because "[d]enial of this constitutional right is prejudicial in itself, regardless of the consequences of self-representation." Breedlove, 79 Wn. App. at 110.

Unlike many rights, the right to represent oneself is not self-executing. If a defendant asks to exercise that right, the trial court must grant it, so long as the request is knowing, voluntary and intelligent, unequivocal and timely, and not made for an improper purpose. See Breedlove, 79 Wn. App. at 106; State v. Fritz, 21 Wn. App. 354, 358-64, 585 P.2d 173 (1978), review denied, 92 Wn.2d 1002 (1979).

Here, Mr. Kinney's rights to represent himself were first violated on January 29, when the judge held Kinney would not be allowed to exercise his rights as he was not "qualified" to handle his own trial. At

that hearing, Kinney tod the court he had also lost trust with counsel and thought counsel was lying to him about things relating to the case. 1/29RP 9. After Kinney told the court that he wanted to represent himself, Judge Hunt responded that Kinney had a "right to do that" but that the court had to advise Kinney that self-representation is "a difficult situation." 1/29RP 10.

At that point, Judge Hunt asked if Mr. Kinney had any training in law, to which Kinney responded "[j]ust knowing that these guys lie to me all the time." 1/29RP 10. The judge then asked if Kinney knew anything about the rules of evidence, and Kinney said, "I don't know anything about any of this except I didn't do what I'm accused of." 1/29RP 10. The judge told Kinney, "you have to understand that representing yourself is more than just getting up and telling your story." 1/29RP 10.

The judge reminded Mr. Kinney he was "on for a jury trial" and asked, "[s]o how are you going to handle that?" 1/29RP 10. Kinney apparently pointed to counsel and said he would have to depend upon counsel to "tell me the truth of how to go about doing it." 1/29RP 10. The following exchange then occurred:

THE COURT:	If you represent yourself, you represent yourself. He's not going to be there.
THE DEFENDANT:	He said he was going to be standby.
THE COURT:	He may have said that, but I determine that, and that's not going to happen. You either represent yourself or you don't.
THE DEFENDANT:	Well, I'll do it, then.
THE COURT:	And I don't think you're qualified to represent yourself.

THE DEFENDANT: I know I'm not, but I can't depend on him. 1/29RP 11. The judge said he had not heard a reason for counsel to be "terminated" and when Mr. Kinney objected that counsel had lied to him, the court said, "[n]o, he hasn't." 1/29RP 10. Mr. Kinney continued to try to speak and the following exchange occurred:

THE COURT:	I said I'm not going to get in an argument with you. You're not qualified to represent yourself. Mr. Blair is not going to be allowed to withdraw, and the matter is set for trial and going to trial.
THE DEFENDANT:	Well, he's fired.
THE COURT:	You don't have that right.
THE DEFENDANT:	I don't got no rights evidently.
THE COURT:	Well, you don't have the right to do that. You're not qualified to represent yourself, so Mr. Blair is going to continue to represent you.
THE DEFENDANT:	Well, just put me in prison, then, and throw away the key, because he ain't gonna represent me.
THE COURT:	All right. Take him out, please.
THE DEFENDANT:	He refuses to.
THE COURT:	Be quiet.

1/29RP 10-11.

Thus, Mr. Kinney was improperly deprived of his constitutional rights to represent himself. The trial court's discretion on this issue depends upon when the defendant's request is made. See Fritz, 21 Wn. App. at 358-60. If the request is made "well before trial" and no accompanied by any motion to continue, "the right to self-representation

exists as a matter of law" and the request must be granted. Id.

Here, Mr. Kinney's request was well before trial. Indeed, it was months ahead.

Further, the trial court's decision was based on its belief that Mr. Kinney was not sufficiently "qualified" to represent himself, because he did not have legal skills or experience. But the defendant's rights to represent himself are not based upon whether he is qualified to do so. See State v. Vermillion, 112 Wn. App. 844, 855, 51 P.3d 188 (2002), review denied, 148 Wn.2d 1022 (2003). Nor is it whether the defendant has "sufficient technical skill to represent himself." 112 Wn. App. at 857.

The trial court erred and violated Mr. Kinney's rights to self-representation on January 29 and this Court should so hold.

Mr. Kinney's rights to self-representation were not violated just in January, however, months before the trial. They were repeatedly violated from that point on. After the court refused to allow him to represent himself, several days later Blair told the court that he had talked to Kinney and Kinney had decided to keep Blair as counsel. 2/5RP 13. The court's entire colloquy on that was to ask Mr. Kinney if he had heard what counsel said and "[i]s that right," after which Mr. Kinney said yes. 2/5RP 13.

By March 12, however, Kinney's continued unhappiness with appointed counsel Blair and his desire to represent himself had again come to a head and, after lengthy discussion, Judge Hunt relieved Blair from representing Kinney. 3/12RP 21. Counsel told the court he had a trial binder prepared and would drop it off for Kinney at the jail. 3/12RP 21. Counsel also said he would prepare an order allowing himself to withdraw.

3/12RP 21.

Just a few days later, however, Judge Lawler called the parties back in for a hearing to talk about Kinney's decision to represent himself. 3/16RP 13. Although Judge Hunt had granted Mr. Kinney's motion for self-representation, Judge Lawler told Mr. Kinney that Kinney would not be allowed to represent himself unless Judge Lawler decided it was okay after Judge Lawler had a chance to talk to Kinney about it. 3/16RP 13-14.

Thus, once again, Mr. Kinney's rights to self-representation were violated. He had already made his motion in front of Judge Hunt. He had already engaged in a lengthy colloquy about the risks and benefits. Indeed, Judge Hunt had already *granted* the motion and Mr. Kinney was *already* without counsel, officially representing himself, as a result of Judge Hunt granting Mr. Kinney's motion.

Yet Judge Lawler decided that the ruling made by Judge Hunt would not be honored and Mr. Kinney would have to again run the gauntlet in order to be allowed to exercise his constitutional rights to self-representation.

It is not surprising that, after having Judge Lawler reopen the matter and being lectured at, again, by another judge for a lengthy period of time about what was best for him, Mr. Kinney ultimately was so confused he just deferred to the court, assuming it was saying what was best. 3/16RP 14-32. That did not convert his clear waiver of counsel in front of Judge Hunt into something *unclear*; it amounted to a change of heart made by an elderly man accused of an unspeakable crime who had by then *twice* been denied his rights to self-representation.

And those rights would be violated, yet again, by Judge Lawler's apparent about-face and denial of self-representation yet again, the day before trial. Even though the judge had said just two days before that he would address the issue again if need be on Mr. Kinney's behalf before trial, when Mr. Kinney then sought to represent himself the day before, the judge was not so accommodating. 3/16RP 32-33. On the 16th of March, the judge had said that, if Kinney continued "to be confused" about whether he should represent himself, the court would "deal with it in the future between now" and the date of trial. 3/16RP 34. Indeed, that day, when the the prosecutor wanted to ensure that Mr. Kinney was aware that he was "giving up his right to represent himself," the court said, "[a]t this juncture," that was happening. 3/16RP 34. The judge also said, however, "[i]f that changes between now and Thursday, we'll deal with it." 3/16RP 35.

When Mr. Kinney renewed his request to represent himself just before trial, however, Judge Lawler was not so flexible. CP 61; 3/18RP 39. On March 18, 2015, counsel told the court that, since the hearing earlier that week, he had met with Kinney "a couple of times," they had talked about the case, counsel had explained "in no uncertain terms" that regardless which judge was presiding Kinney would not be allowed to question witnesses himself if he had an attorney and that Kinney could only question witnesses if he represented himself. 3/18RP 39. Counsel said that, against his advice, Kinney was insistent on self-representation. 3/18RP 39-40.

Counsel said he had copied discovery and left it for Mr. Kinney at

the jail. 3/18RP 41. There were several witness statements, however, which Mr. Kinney had not previously seen, so he would need some additional time. 3/18RP 41-42. The judge said that was a "real problem" because trial was set for the next day. 3/18 41-42. The judge also reminded Kinney that he had been unhappy about the November extension and speedy trial. 3/18RP 41.

Although the prosecution had received continuances and Kinney was willing to waive his speedy trial rights, Judge Lawler said, "basically I don't see a basis for a continuance here." 3/18RP 42-43. The judge asked the prosecutor if she objected to a continuance, and the prosecutor responded, "Mr. Kinney seems pretty insistent that he wants to represent himself." 3/18RP 43-44. The prosecutor said the victim's family objected to delay, however. 3/18RP 44.

Again, the judge explained how Mr. Kinney's complete lack of experience with conducting a trial would work against him. 3/18RP 47. The judge promised to allow Mr. Kinney to confer with Mr. Blair without the jury there if needed to see whether any issues between them about what questions to ask could be resolved, if Kinney went forward with counsel. 3/18RP 47-48. The court told Kinney he needed to "think really long and hard" about what he was doing because of the seriousness of the case. 3/18RP 47-48. Mr. Kinney told the court he did not think counsel could represent him because Kinney's attorney did not believe in his innocence. 3/18RP 48. Eventually, however, Mr. Kinney said he "might as well just go for tomorrow," trial, with Blair as counsel. 3/18RP 48-49.

The next day, on March 19, 2015, Judge Brosey took Mr. Kinney's

Alford plea to a second amended information charging only child molestation in the first degree. 3/19RP 77.

The Alford plea must be set aside. It was not only not knowing, voluntary and intelligent, but is also did not meet the heightened requirements for an Alford plea, because it was not the product of a free reasoned choice among legally available alternatives.

It appears that no court in this state has addressed the question of whether denial of a proper request to exercise the right to self-representation renders a subsequent plea constitutionally invalid. However, 9th Circuit jurisprudence and recent holdings of the U.S. Supreme Court support such a holding. In United States v. Herrnandez, 203 F.3d 614 (9th Cir. 2000), a defendant was improperly denied his right to self-representation, then entered a plea. 203 F.3d at 626. In finding that the improper denial of the rights made the resulting plea involuntary, the 9th Circuit pointed out that the denial created an improper choice, requiring the defendant to submit to a trial where he is deprived of the fundamental right to self-representation or enter a plea with counsel with whom his relationship is irretrievably broken. 203 F.3d at 626.

By denying the right to self-representation, the Court found, the resulting plea was rendered involuntary:

> To be voluntary, a plea must be one in which the defendant is permitted to choose between pleading guilty and undergoing a trial that comports with the fundamental principles the Constitution imposes . . .*When a defendant is offered a choice between pleading guilty and receiving a trial that will be conducted in a manner that violates his fundamental Sixth Amendment rights, his decision to plead guilty is not voluntary, for in that case, he has not been offered the lawful alternatives - the free choice - the Constitution requires.*

203 F.3d at 627 (emphasis added). This decision is entirely consistent with recent Supreme Court caselaw, which made it clear that defendants are entitled to effective assistance of counsel in deciding whether to enter a plea. See, e.g., Lafler v. Cooper, __ U.S. __, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).

It is especially important in this case that Mr. Kinney entered an Alford plea, which requires greater scrutiny than a normal plea of "guilty." See State v. Newton, 87 Wn.2d 363, 372, 552 P.2d 682 (1970). With an Alford plea, the defendant is not admitting his guilt; he is maintaining his innocence but making a pragmatic decision to accept a "deal" offered by the state instead of facing the risks presented by going to trial. Alford, 400 U.S. at 31.

Thus, unlike with a normal guilty plea, an Alford plea is "inherently equivocal." In re Montoya, 109 Wn.2d 270, 280, 744 P.2d 340 (1987). In deciding to make an Alford plea, a defendant has engaged in a cost-benefit analysis of his various options and determined which is best based on what he is told by his attorney and the court at the time. See State v. D.T.M., 78 Wn. App. 216, 219, 896 P.2d 108 (1995).

For this reason, an Alford plea is subjected to a higher standard. Montoya, 109 Wn.2d at 280. Such a plea is not knowing, voluntary and intelligent unless it is the product of the defendant's free, reasoned choice among the legally available alternatives. Id.

Further, a court accepting an Alford plea is required to treat it differently than other pleas and must instead exercise "extreme care to ensure that the plea satisfies constitutional requirements" because of its

equivocal nature. 109 Wn.2d at 277-28.

In this case, Mr. Kinney could not have been more clear. He repeatedly maintained that he was innocent. And he repeatedly objected to the idea of ever being deemed to have said otherwise. His Alford plea was very obviously equivocal. And based upon the repeated denial of his rights to self-representation by the courts below, his plea cannot be seen as anything other than the product of the improper denial of his rights. The right to self-representation is a right of choice, meaning that what it protects is the defendant's right to make a particular decision, even if that decision might make his life worse. See Flanagan v. United States, 465 U.S. 259, 268, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984).

Mr. Kinney was deprived of his fundamental constitutional right to self-representation not once but multiple times, in error. The equivocal Alford plea he entered as a result was not knowing, voluntary and intelligent. This Court should so hold.

2. THE TRIAL COURT ERRED IN FAILING TO PROPERLY CONSIDER KINNEY'S ABILITY TO PAY DISCRETIONARY COSTS AND COUNSEL WAS INEFFECTIVE

In addition to the other errors, this Court should also reverse and remand for resentencing, because the trial court failed to conduct the analysis required under Blazina, supra, and improperly imposed discretionary costs without considering Mr. Kinney's actual ability to pay as required under RCW 10.01.160(1). Further, this Court should remand for resentencing with instructions for the trial court to engage in the analysis set forth by the Supreme Court subsequently in State v. Blazina,

supra, because this case presents the very same policy concerns which compelled our highest court to act in that case, even absent objection below. Finally, if this Court finds that the issue was waived by counsel's unprofessional failures below, reversal and remand for resentencing is required with new counsel.

Under RCW 10.01.160(1), a trial court can order a defendant convicted of a felony to repay court costs as a part of a judgment and sentence. Another subsection of the same statute, however, prohibits a court from entering such an order without first considering the defendant's specific financial situation. RCW 10.01.160(3) provides:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

In Blazina, our highest Court recently interpreted RCW 10.01.160(3). Blazina involved two consolidated cases, each with an indigent defendant. 182 Wn.2d at 831-32. In one case, the sentencing court ordered a $500 crime victim penalty assessment, a $200 filing fee, a $100 DNA fee, $1,500 for assigned counsel and restitution to be determined "by later order." Id. The other sentencing court ordered the same fees except only $400 for appointed counsel and an additional $2,087.87 in extradition costs. Id.

Neither defense counsel raised an objection to the imposition of the costs or fees on their indigent client. Id.

On review, the defendants argued that the failure to comply with the requirements of RCW 10.01.160(3) on the record was error. The

prosecution first argued that the issue was not "ripe for review" until the state tried to enforce collection of the amounts imposed. 182 Wn.2d at 833 n. 1. The Supreme Court majority found instead that the issue was primarily legal, did not require further factual development and involved a final action of the sentencing court, a conclusion of "ripeness" with which the concurring justice seemed to agree. Id.

The Court majority also found that RCW 10.01.160(3) was mandatory, noting that it requires that a trial court "**shall not**" order costs without making an "individualized inquiry" into the defendant's individual financial situation and their current and future ability to pay, and that the trial court "**shall**" take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose" in determining the amount and method for paying the costs. 182 Wn.2d at 834-35 (emphasis in original). And the Court found that, in this context, the word "shall" is imperative. Id.

Further, the Court agreed with the defendants in both of the consolidated appeals that the individualized inquiry must be done on the record. It then rejected the a "boilerplate" clause, preprinted on the judgment and sentence, as sufficient:

> Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors. . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

182 Wn.2d at 837-38.

The Blazina majority gave sentencing courts guidance on making the determination of "ability to pay," referring them to the comments to GR 34 which set forth nonexclusive ways of determining indigency, including looking at household income, federal poverty guidelines, whether the person receives federal assistance and other relevant questions, specific to that particular defendant. Id.

The Blazina majority held that, in crafting RCW 10.01.160(3) the Legislature "intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances." Id.; see also, 182 Wn.2d at 840-41 (Fairhurst, J., concurring). Further, the majority believed that the trial judge's failure to consider the defendants' ability to pay in the consolidated cases on review in Blazina was "unique to these defendants' circumstances." Blazina, 182 Wn.2d at 833. The Court therefore believed that the failure of a sentencing court to properly consider the defendant's present and future ability to pay was an error not expected to "taint sentencing for similar crimes in the future." Id.

But the majority nevertheless decided to reach the issue. While stopping short of faulting lower appellate courts for declining to exercise their discretion to do so thus far, the Blazina Court held that "[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." 182 Wn.2d at 834. The Court chronicled national recognition of "problems associated with LFO's imposed against indigent defendants," including

inequities in administration, impact of criminal debt on the ability of the state to have effective rehabilitation of defendants and other serious, societal problems "caused by inequitable LFO systems." Id. One of the proposed reforms the Court mentioned was a requirement "that courts must determine a person's ability to pay before the court imposes LFOs." Id.

The Court then noted the flaws in our own state's LFO system and the system's "problematic consequences." Id. The Court was highly troubled by the fact that, in our state, LFOs accrue a whopping 12 percent interest and potential collection fees. Id. And the Court described the ever-sinking hole of criminal debt, where even someone trying to pay who can only afford $25 a month will end up owing *more* than initially imposed even after *10 years* of making payments. Id. The Court was concerned that, as a result, indigent defendants are paying higher LFOs than wealthy defendants, because of the accumulation of interest based on inability to pay. Id.

Further, the Court noted, defendants unable to pay off LFOs are subject to longer supervision and entanglement with the courts, because courts retain jurisdiction until LFOs are completely paid off. 182 Wn.2d at 836-37. This increased involvement "inhibits reentry," the justices noted, because active court records will show up in a records check for a job, or housing or other financial transaction. Id. The Court recognized that this and other "reentry difficulties increase the chances of recidivism." Id.

Finally, the Blazina majority pointed to the racial and other

disparities in imposition of LFOs in our state, noting that disproportionately high LFO penalties appear to be imposed in certain types of cases, or when defendants go to trial, or when they are male or Latino. Id. The court also noted that certain counties seem to have higher LFO penalties than others. Id.

The concurrence in Blazina agreed that the issue required action by the Court, but disagreed with how the majority applied RAP 2.5(a) and its exceptions. 182 Wn.2d at 839. The concurrence would have found the error non-constitutional and would not have addressed it under RAP 2.5(a)(3) but would instead have reached the issue under RAP 1.2(a), "to promote justice and facilitate the decision of cases on the merits." Id. The concurring justice felt it was appropriate for the court to exercise its discretion to reach the unpreserved error "because of the widespread problems" with the LFO system as applied to indigents "as stated in the majority." Id. And she also would have reached the error, because "[t]he consequences of the State's LFO system are concerning, and addressing where courts are falling short of the statute will promote justice." Id.

In this case, the judge ordered Kinney to pay, *inter alia*, $1,800 "attorney fee recovery" and, by separate order, apparently several other fees, as well as costs of incarceration. See 7/14RP 54-55. These amounts were ordered paid by the 62-year old Kinney, who had just been ordered to serve nearly five years in prison. 7/14RP 54. Despite his indigence, despite his age, despite his sentence, without much discussion, the judge made a "specific finding Mr. Kinney is able-bodied and has the ability to work and make periodic payment on financial obligations imposed by the

Court." 7/14RP 54. Although counsel noted that Kinney was on social security disability, the judge was unfazed, saying that Kinney could "divert a portion" of those federal benefits to pay the LFOs. And the court then ordered Blair to be paid for an hourly bill he submitted, as well. 7/14RP 56. On the judgment and sentence, the same pre-printed clause which was found insufficient in Blazina was marked, as was a preprinted box requiring Mr. Kinney to pay costs of incarceration.

Just like the defendants in Blazina, Mr. Kinney is indigent. Just like those defendants, he is already subject to 12% interest, compounding right now. And just as in Blazina, here, there was no consideration of whether he has any present or future likelihood of having any hope of paying, despite the face that he will be in prison for some time and despite the requirements of RCW 10.01.160 as noted in Blazina.

Mr. Kinney is in the same situation as the defendants in the consolidated cases in Blazina. He is already suffering the impacts of the unfair and unjust system our Supreme Court has now condemned and will continue to be impacted by that unless this Court follows Blazina and orders resentencing. The resentencing court should be ordered to consider Mr. Kinney's' "individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay," on the record as set forth in Blazina, before deciding whether it should even impose legal financial obligations.

Mr. Kinney was 62 when he was sent into prison. 7/30RP 2. He was a Vietnam war veteran on Social Security disability "of about $650 a month." 7/30RP 2. He was receiving food assistance, and he was living

in a trailer. 7/30 RP 2.

Mr. Kinney was not only found indigent for the purposes of trial proceedings but also, on July 17, 2015, for the purposes of appeal. CP 165-66. And a few days later, his second appointed counsel asked for $1,470 to be added to his own client's Judgment and Sentence for fees and that order was entered, without Mr. Kinney present, on July 22, 2015, by Judge Brosey. CP 174. It also appears additional attorney costs were order. CP 100.

Regarding the costs of incarceration order, Leonard, supra, is directly on point. In Leonard, the Supreme Court held that Blazina requirements of an individualized inquiry into ability to pay must be made before the court can impose costs of incarceration as a condition of a sentence. 184 Wn.2d at 506. The trial court had declined to impose costs of appointed counsel or similar costs under RCW 10.01.160 but had ordered costs of incarceration to be paid under RCW 9.94A.760(2).

In reversing, the unanimous Supreme Court held that the costs of incarceration are discretionary like those at issue in Blazina and that ordering costs of incarceration "expressly depends on a determination by the trial court 'that the offender, at the time of sentencing, has the means to pay.'" Leonard, 184 Wn.2d at 506-507; quoting, RCW 9.94A.760(2).

Put simply, the Leonard Court held:

> [T]he assessment of costs of incarceration. . .must be based on an individualized inquiry into the defendant's current and future ability to pay that is reflected in the record, consistent with the requirements of Blazina. Here, the record reflects no such inquiry at the sentencing hearing, and the judgment and sentence form contains only boilerplate findings of ability to pay, which this court in Blazina held to be inadequate.

184 Wn.2d at 506.

It is troubling that a trial court judge imposing a sentence more than four months after the Blazina decision would so clearly fail to give any meaningful consideration to the real analysis required to find individual ability to pay. Even more, that a state court would suggest it proper for an indigent defendant to divert social security disability payments meant for subsistence to payment of LFOs indicates that the judge is unaware of the true circumstances facing people like Mr. Kinney. Given his age and situation, the imposition of thousands of dollars of discretionary costs without proper consideration was a clear error.

In the alternative, reversal and remand for resentencing in light of Blazina is required because Mr. Kinney was deprived of effective assistance of appointed counsel at sentencing. Both the state and federal constitutions guarantee that a person who cannot afford counsel is appointed counsel to assist her, and that appointed counsel provides effective assistance. See Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); see State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by, Cary v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 483 (2006); Sixth Amend.; Art. 1, § 22. Counsel is ineffective when, despite a strong presumption of competence, his performance falls below an objective standard of reasonableness and that deficiency causes prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990), dissapproved of in part and on other grounds by, State v. Condon, 182 Wn.2d 307, 343 P.3d 357 (2015).

Here, even if the Court does not choose to exercise its discretion to grant Kinney relief from the discretionary legal financial obligations and costs of incarceration imposed without consideration of his individual ability to pay, relief should be granted based on counsel's ineffectiveness in failing to raise the issue below. The Blazina decision was issued in March of 2015, yet at sentencing here in July, counsel's only objection was that his client was on social security disability. As a result, counsel's client has been ordered to pay discretionary costs he cannot afford, at exorbitant credit rates and terms, effective from the date of sentencing, even though he is indigent, in custody and was and is represented by appointed counsel because of his poverty. Counsel's unprofessional failure to be aware of the state of current law and advocate for his client's rights prejudiced his client, and reversal should be granted on that basis even if this Court does not choose to exercise its discretion under Blazina.

3. THE ISSUE OF COSTS ON APPEAL IS NOT BEFORE THIS COURT UNTIL ITS DECISION ON THE MERITS AND THIS COURT SHOULD NOT ADD THE INEFFICIENT NEW PLEADING REQUIREMENTS DIVISION ONE ERRONEOUSLY CRAFTED IN SINCLAIR

Under RCW 10.73.160 and RAP Title 14, this Court may order the appellant in a criminal case to pay the costs of an unsuccessful appeal from his conviction. See State v. Nolan 141 Wn.2d 620, 628, 8 P.3d 300 (2000). This state, however, guarantees a constitutional right to appeal from such a conviction. See State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997).

In Blank, our highest Court addressed the conflict between the

constitutional right and the imposition of costs of appeal in this state, concluding that the imposition of costs was proper because "ability to pay" would be considered before any punishment could be imposed for the failure to pay. Blank, 131 Wn.2d at 244, 246, 252-53. That premise has been effectively disproved. See Blazina, supra. The question before the Court at this time, however, is not whether Blank retains its validity after Blazina, or whether costs on appeal are properly imposed in this particular case. Despite the recent decision from Division One in Sinclair, supra, consideration of costs on appeal is not an issue addressed by this Court before or even as part of the merits. Instead, the question of whether costs should be imposed on appeal cannot be determined until after this Court has decided the substance of the appeal.

Both the Rules of Appellate Procedure and the statute under which costs are imposed make this clear. RAP Title 14 provides that the court makes the decision on costs only "after the filing of a decision terminating review[.]" RAP 14.1(a). While the court has the authority to award costs in a decision on the merits, in general it is the Commissioner or Clerk of the Court which awards costs under RAP 14.2, and then only to the "party that substantially prevails on review." RAP 14.3 defines expenses which may be allowed as costs and RAP 14.1(f) requires the party claiming costs to file a cost bill "in the manner provided in rule 14.4."

Imposition of costs is not automatic even if a party establishes that they were the "substantially prevailing party" on review. Nolan, 141 Wn.2d at 628.. In Nolan, the court of appeals agreed with the prosecution that an award of costs on appeal was "virtually automatic" whenever the

defendant in a criminal case did not prevail. But our state's highest Court rejected that idea, holding that, even if there is a "substantially prevailing party," the appellate court has considerable discretion to choose to impose costs for that party. Nolan, 141 Wn.2d at 628.

Indeed, the Court held, the authority to award costs of appeal "is permissive," so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are technically entitled to costs under the rule. Nolan, 141 Wn.2d at 628.

Under RAP 14.3, the only expenses allowed as costs are statutory attorney fees and reasonable expenses "actually incurred by a party for the following items which were reasonably necessary for review may be awarded:" transcript and clerk's papers costs, copy costs at the court, transmission of the record, filing fees and "other sums as provided by statute." RAP 14.4 provides the procedure for seeking costs, requiring that the party seeking costs must file and serve a cost bill very shortly after a decision, i.e., "within 10 days after the filing of an appellate court decision terminating review." RAP 14.4(a).

As a result, a party is not entitled to recover costs of appeal unless they timely file a request for such costs *after* a decision terminating review. Further, to be entitled to costs, the party must show that, based upon that same decision, he or she meets the standard of being the "substantially prevailing party" on review. RAP 14.2. In fact, RAP 14.2 specifically provides that, "[i]f there is no substantially prevailing party on

review, the Commissioner or Clerk **will not** award costs to any party" (emphasis added). Where both parties prevail on major issues, there is actually no "substantially prevailing party" on review for the purposes of an award of appellate costs under RAP 14.2. Nolan, 141 Wn.2d 626, citing American Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990).

In Sinclair, supra, Division One of the Court of Appeals recently looked at the issue of costs on appeal when a defendant whose conviction was affirmed objected to imposition of costs on appeal after a cost bill was filed post-decision by the state. The prosecution urged the Court to automatically impose costs on appeal against indigent defendants in every case and wait to see if the defendant brings a remission hearing on his own in trial court to ask for relief from imposition of such costs. Division One rejected that idea, holding that the future possibility that the defendant who is indigent might get some kind of relief from costs in a remission hearing does not "displace this court's obligation to exercise discretion when properly requested to do so." App. A at 2-3. The Court also rejected the appellant's argument that remand for an "ability to pay" hearing akin to Blazina was required. App. A at 4. Division One thought that such a procedure 1) would improperly "delegate" to the trial court the appellate court's duty of deciding appellate costs, and 2) appellate briefs can set forth "[f]actors that may be relevant to an exercise of discretion" to impose appellate costs under RCW 10.73.160 "at least as efficiently in appellate briefs as in a trial court hearing." App. A at 4. Division One then held

that it would only deem the issue of appellate costs in a criminal case "when it is raised in an *appellant's* brief." App. A at 4 (emphasis added).

Thus, Division One effectively appears to have held that defense counsel is required to raise the potential issue of appellate costs in the opening brief on appeal, even if the issue will not ever arise or require this Court's consideration because there might not be a substantially prevailing party on review when the case goes further. Indeed, Division One recognized that this novel new briefing requirement "puts appellate defense counsel in the position of assuming the client may not prevail on substantive claims." App. A at 4. Not only that, Division One recognized that its new procedure has "practical inefficiencies," because it may require counsel to "include a presumptive argument against costs in every case" even if the state does not intend to seek costs later.

Ultimately, Division One thought it would be appropriate for there to be a "rule change requiring the State to include a request for costs in the brief of respondent[.]" App. A at 4. Recognizing that Absent that change in rule, however, Division One decided to adopt onto the issue of appellate costs the rule of RAP 18.1(b), which the court described as a "somewhat analogous situation." App. A at 4. The Sinclair panel then decided to add a requirement that an appellant should "devote a section of its opening brief" to rebutting any potential request for imposition of appellate costs, with the prosecution then given "the opportunity in the brief of respondent to make counterarguments **to preserve the opportunity to submit a cost bill**." App. A at 4 (emphasis added).

Division One then made conflicting rulings about what such argument would actually require. Comparing the situation to that in RAP 18.1(b), the court said, "[t]ypically, a short paragraph or even a sentence is deemed compliant with the rule," and that, as a result, "we are not concerned that this approach will lead to overlength briefs." App. A at 4. The court then stated that the parties should have sufficient information to present to the appellate court which would be relevant to the issue of whether costs should be imposed in the future if there is a substantially prevailing party and a proper request is made:

> Both parties should be well aware during the course of appellate review of circumstances relevant to an award of appellate costs. A great deal of information about any offender is typically revealed and documented during the trial and sentencing, including the defendant's age, family, education, employment history, criminal history, and the length of the current sentence.

App. A at 4. And it is not only that information the court thought was needed to support its decisions regarding appellate costs, but also "current ability to pay" and indeed other factors, because the list in Sinclair "is not intended as an exhaustive or mandatory itemization of information that may support a decision one way or another." App. A at 4. Division One concluded that parties should provide such briefing in order to assist the appellate court in the exercising its discretion "by developing fact-specific arguments from information that is available in the existing record," not only about ability to pay but also about the other factors it thought were relevant to the inquiry. App. A at 5.

The Sinclair Court then declined to impose appellate costs on Sinclair, who was 66 years old, likely to die in prison and who qualified

not only for an order of indigency at the trial court level but also for the purposes of appeal, concluding that, "there is no reason to believe Sinclair is or ever will be able to pay $6,983.19 in appellate costs (let alone any interest that compounds at an annual rate of 12 percent)." App. A at 5. It did so despite the prosecution's claim that Sinclair had a solid work history and there was no evidence he would be unable to work in the future. App. A at 5. Division One noted that there is a presumption of continued indigency throughout appellate review under RAP 15.2(f), which requires the appellate court to "give a party the benefits of an order of indigency throughout the review unless the *trial court* finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f) (emphasis added). Because there was no trial court order that his financial situation had improved or is likely to improve, and no realistic possibility he would be gainfully employed at his release in his 80s, the court exercised its discretion to deny the state's request for appellate costs.

Sinclair thus appears to add three new requirements, only one of which is consistent with the rules. It is consistent with the rules for Division One to honor and apply the presumption of indigence set forth in RAP 15.2(f). But the new requirements Division One created by engrafting RAP 18.1(b) onto this situation run afoul of the Rules, the statute and Washington Supreme Court precedent.

In Blank, the Court specifically held that RCW 10.73.160 ."RCW 10.73.160 does not apply unless and until a defendant's is convicted on appeal;" and until that point, "the statute is not triggered and no liability

for costs arises." 131 Wn.2d at 251.

Further, in Blank, our highest Court specifically rejected the same claim as that raised by Division One in Sinclair - that the briefing requirements of RAP 18.1 should apply to imposition of costs on appeal. The Blank Court declared that those "expenses which ay be recouped under RCW 10.73.160 **do not fall within RAP 18.1.**" Blank, 131 Wn.2d at 250 (emphasis added).

Ultimately, Division One's decision makes no sense. It requires briefing not previously required, anticipatory to any issue even being raised, on an issue which may never need to be decided by the Court, in advance of the existence of the very facts which will be required for the decision to be made. Put simply, it is nonsensical and a waste of scarce resources to engraft a new pleading requirement in this fashion. This Court should decline to follow Division One's improper decision in Sinclair.

E. CONCLUSION

For the reasons stated herein, this Court should grant relief.

DATED this 15th day of March, 2016.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel via this court's portal upload at Lewis County Prosecutor's Office, Sara.Beigh@lewiscountywa.gov, and appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: Mr. Robert Kinney, DOC 381454, Coyote Ridge CC, P.O. Box 769, Connell, WA. 99326.

DATED this 15th day of March, 2016.

/S/Kathryn A. Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353